MICHIGAN SUPREME COURT

September 14, 2000 Public Hearing

**JUSTICE WEAVER:** Good morning to all of you. This morning we have an administrative hearing and we are happy to see you and I'd like to lay out our rules that give everyone an opportunity to speak. As you know, you will have 3 minutes to speak. When you come to the podium there will be no light on. When there is one minute left you will get a yellow light and when your time is up you will get a red light. With that, let us begin with the first item on our docket and that is #99-04 which is a proposed amendment of Rule 7.302 of the Michigan Court Rules of whether there should be an appeal of right from orders denying motions to set aside default judgments. I have in front of me a list of people who have asked to be heard and if there is anyone else who has not already asked to be heard they should let the clerk know and if there is time we will work you in. Mr. William Luther, please come forward. And each time you come forward if you would identify who you are and then go forward.

Item 1 - 99-04: Proposed Amendment of Rule 7.203 of the Michigan Court Rules

**MR. LUTHER:** I'm William Thorton Luther and I appreciate the time here. It's a great honor to be here. In summary judgments and default judgments, if there is not a right of appeal I believe then there is no due process. Everyone here is certainly here for a motive so I have to be up front and I'm here for a motive. I have several cases of course but one in particular is Luther v Thorson. And in Luther v Thorson it's all tied to my whole saga of Luther v John Miller et al. And in Luther v John Miller et al. it wasn't even summary judgment in the federal court. In less than 24 hours it was just disposed of. Now it's a sad saga and a sad state when a person and a citizen has to come to the Supreme Court for protection to be sale. And I have been told through a source that Don Davis is placing hurt and harm on my person and I have to come here to get this all documented. It's a sad state. I think we all need to lighten up in this state of Michigan and in this country. I feel that if we could have as far as summary judgments no summary judgments. Give everybody a shot. I don't like to play lawyer. I can't get into that. I don't want to be pro se, pro per and all that other good stuff. I would rather like to have an attorney but that's not always the case. But we could triple the Court of Appeals filing fee for those who go pro se and don't make it in their trial. But we need trials. We need shots. Luther v Thorson, I need a shot at that. That would be very interesting. And in closing I wish Mr. Young and Mr. Taylor and Mr. Markman the best in your elections. My family tree started the Republican party, started it. And I mentioned about lightening up, I think we all need to. I think president Gore has the right idea. It appears that Mr. Gore and Hillary Clinton are getting together. Womanizing or energizing. And I just want to give this to this person here, and we need to

have fun in courts. Thank you.

**JUSTICE WEAVER:** Thank you Mr. Luther. All right. The next speaker I have listed here is Jerry Bush. Is Mr. Bush here? I would want to remind everyone that we have to keep our comments to the issues at hand and the specific court rules. We cannot handle argument of cases here at this time. It's an administrative issue.

**MR. BUSH:** Hi. I take it we're dealing with issue one.

**JUSTICE WEAVER:** We are still on item 1 which is administrative 99-04, which is a proposed amendment of court rule 7.203 of the Michigan Court Rules which is whether there should be an appeal of right from orders denying motions to set aside default judgments.

**MR. BUSH:** Recently I was involved in a default judgment case. I was criminally charged, you might say, and hired a lawyer and he didn't appear. Well, he put in an appearance but he didn't do anything and didn't let me know and a default judgment was entered against me and my wife and I had to pick up the ball myself and write a motion to set aside default judgment and just take over the case basically. Now definitely I think there should be an appeal of right from orders denying motions to set aside default judgments. I absolutely believe that is fair and just. But not only that, I think that the court rules, if the case is in circuit court, it seems to me there is an appeal of right already because circuit court cases have a right to be appealed to the Court of Appeals. So this would be, I don't know that you are saying this would apply to district court, that there would be an appeal of right from district to circuit. I don't know exactly what you're proposing in that but anyway I do believe that that would be a good thing. By the way, the judge who was a circuit court judge who ruled on our motion to set aside never addressed the issue and ultimately ruled in favor of the city against us ignoring basically an unpublished opinion of the Court of Appeals that found that they should have been moving against us. And I'll address a little more of that later, thank you.

**JUSTICE WEAVER:** Thank you Mr. Bush. I want to, Mr. Bush reminded me that I need to make it clear that all of these proposals we have put forward, they have been submitted to us by various groups or parties or some of them are ideas. All of them are proposals that we feel should have public comment. Because they have been published doesn't mean that the Court has decided they should or should not be. We just want to hear the ideas of what should be done by the people who have brought them to us and we want to have comment on them. So you should not presume that the Court either favors or disfavors any of the proposals because we have had them published. Also I do need to mention that Justice Taylor is not able to be with us today but he will have access as this is being video recorded and also to a transcript of the proceedings. Okay with that let's

proceed to our next speaker, Troy Scott.

**MR. SCOTT:** Good morning Your Honor. Good morning members of the Court. My name is Troy Scott. I'm here representing the Michigan Creditors Bar Association and Your Honors, this morning up to this point I've still not heard any clear arguments that the current statutory safeguards are in any way insufficient. In fact, when we reviewed the proposed court rule I began to question why it is that proposal is being made in light of the fact that first of all we have very clear procedures for entering default judgment and those guidelines and requirements must be met before a default judgment will be issued. Even if it is issued there are 21 days, an automatic right of appeal during that time to make claims about either insufficiency of service or liability questions. Beyond that we have court rule 2.612 which affords another procedural safeguard for defendants who claim they were never served during the first year after this default judgment has been entered. Clearly for the creditors' attorneys throughout the state of Michigan we recognize the requirements we have on proper service and then entry of default and we also understand that there may be instances where that individual is not properly served and may not have had notice. But in those cases where they have had, the safeguards are already in place and we don't believe that there is a need to afford an automatic appeal right especially in light of the fact of the way this is drafted. Your Honors, this does not indicate other than saying the defaulted party had not appeared, it does not indicate why there was non-appearance. Was it because they did not get served. Was it because they didn't have time or they didn't hire an attorney. I think this needs to be made clear. Simply not appearing leaves the door wide open as to reasons why they may not have appeared and the reasons why they may not have appeared may not be justifiable to any court at any level. So we would ask that this proposed rule be either redrafted or simply not approved by the Court.

Item 2 - 99-05: Proposed Amendment of Rule 6.1122 of the Michigan Court Rules

**JUSTICE WEAVER:** Any questions? Thank you so much. That concludes the number of people who have asked to testify on Item 1. So we will move to Item 2 which is 99-05. This item is a proposed amendment of Rule 6.112 of the Michigan Court Rules and this is whether to specify a 21-day period of filing notice of intent to seek an enhanced sentence. Asking to testify on this is Mr. Jerrold Schrotenboer.

**MR. SCHROTENBOER:** Thank you, Jerry Schrotenboer in the Jackson Prosecutor's office. I really don't see a problem with the court rule specifying what the rule is. I just have a slight problem with the rule. My concern is the rule as set up pretty much seems to say that there is a severe cut-off. It doesn't matter what reason whatsoever. If the prosecutor doesn't file this within 21 days, that's it, it's gone forever. Even if the prosecutor absolutely did not know about it until later. I know that I raised this point in the recent application, People v Lewis. This Court has denied that. Fine. I'm certainly not going to

reargue that. However, this is a court rule amendment suggestion that goes of course beyond Lewis. And I suggest that the rule that this Court adopted in previous cases never with any dissent whatsoever that it kept going again, that it just continue that rule and make it clear that there is–

**JUSTICE YOUNG:** What about P.A. 1994-10, 110?

**MR. SCHROTENBOER:** Well, one of two things. Either the statute does not mention this point or it does. If it does, why are we here. If it does not, then you can do what you want to do.

**JUSTICE YOUNG:** Well our court rule is inconsistent with the statute, isn't it?

**MR. SCHROTENBOER:** No, the court rule just doesn't specify on it. Doesn't say anything. The statute–

**JUSTICE CORRIGAN:** Why wouldn't your remedy be at the Legislature, Mr. Schrotenboer.

**MR. SCHROTENBOER:** Well that of course is one remedy.

**JUSTICE CORRIGAN:** Right. So why are you asking us to write additions in when you could–

**MR. SCHROTENBOER:** It's writing an addition in only to the extent that the Legislature is silent on the point. The Legislature does not specifically address what is the remedy. It just says you're to do is. And people, from what I can see, are just assuming that that's the remedy. Yes of course the Legislature is a different forum, is an alternate forum. You may disagree, and if you disagree that's fine. But as far as I can see the Legislature absolutely did not address this question. It said 21 days and it didn't say anything what happens if you don't do it within 21 days. Yes I know I'm repeating my arguments of Lewis.

**JUSTICE WEAVER:** Are there any further questions on this issue? On item 2. You were the only person that asked to speak on item 2 and you are the first person listed on item 3 so if you would just wait there a minute. I also need to remind us all that each speaker has their 3 minutes before the Justices will question you and thereafter, if you finish before 3 minutes, than obviously we'll question you.

Item 3 - 99-07: Proposed Amendment to Rule 7.302 of the Michigan Court Rules

**JUSTICE WEAVER:** This Item 3 now is 99-07 and it's a proposed amendment to Rule 7.302 of whether unpublished decisions of the Court of Appeals should be published in the Michigan Reports under certain circumstances and you've asked to speak on that Mr. Schrotenboer.

**MR. SCHROTENBOER:** Yes, thank you. Jerry Schrotenboer from the Jackson Prosecutor's office. Overall I think this is a good idea and I think it should in fact be adopted. I'm sorry if I'm going to sound like I'm kind of ranting off on a side issue but I'm not. There is another reason why we normally don't specifically address, that I would never put into writing. The reason behind this rule of course is to give more guidance to the lower courts, which of course is a very good reason. One of the reasons why it is more important for this Court to do it is because the Court of Appeals is not doing its job sufficiently on this point. It is not publishing at times when it should be publishing and it is denying leave to appeal in far too many cases, including first impression issues. And therefore, this to a certain extent alleviates the problem and is a good idea and I think that it should be adopted.

**JUSTICE MARKMAN:** To what extent does it not alleviate the problem.

**MR. SCHROTENBOER:** The Court of Appeals denying leave to appeal too often on cases, that by itself is a particular problem that goes beyond this. The Court of Appeals is supposed to be an error-correcting court. Unfortunately it does not see itself as that. It has never seen itself as that. And the only remedy for that is for this Court to send it back to the Court of Appeals as a leave granted, which of course is not a particularly good idea. Now how to alleviate that problem I have no idea.

**JUSTICE CORRIGAN:** Mr. Schrotenboer, one of the arguments being made against this proposal is that it's easy for lawyers to identify on the Web and to search and find, and for litigants, to search and find these orders. Could you just lay out if you know sir, how long it would take in an average case to track down the unpublished order that is ostensibly available on the website if this Court doesn't publish the order. Do you understand my question.

**MR. SCHROTENBOER:** Yes I do. My finding it on the website would be a bit difficult. I'm not particularly great at Internet access. What I do is if I come across one of these things I try to find the Court of Appeals number and then I phone the Court of Appeals and ask the Court of Appeals who are the parties in the case and if it's a criminal case I phone the prosecutor and ask for a copy of it. Which sometimes it's been so many years they don't have a copy anymore. The thing is, I completely disagree with any claim whatsoever that unpublished cases should be kind of treated like published cases. That is

just a very bad idea. There are just too many cases on the Court of Appeals for every one to treat every case the same. Everyone who writes opinions says the same thing. I didn't put as much into the unpublished as I did into the published. And this gets around that. This gets to the point where a court actually says this is important. Sometimes it takes me a long time to find those cases but I do not claim to have the best analysis. One of the big problems with it is that there is no real digest system of unpublished cases.

**JUSTICE YOUNG:** Well the Supreme Court Order granting leave gives you the Court of Appeals number. Are you saying there is no one in the Jackson County Prosecutor's office that is computer literate enough to get it off the Supreme Court website or the Court of Appeals website.

**MR. SCHROTENBOER:** Oh, I can get that. But when the Supreme Court actually grants leave to appeal, the Court of Appeals opinion, whether published or not, is kind of a moot point. All it matters is what the Supreme Court eventually says.

**JUSTICE YOUNG:** Well all this rule does is require that the heretofore unpublished Court of Appeals opinion that is the subject of the grant by this Court be published.

**MR. SCHROTENBOER:** Or, from what I understand, a peremptory reversal. If the Court peremptorily reverses a case, is going to publish the unpublished opinion from the Court of Appeals, that's what I'm talking to.

**JUSTICE CORRIGAN:** It's not becoming precedent in that regard. It's simply for the convenience of the bench and bar so there is easy access to what the court is interested in.

**MR. SCHROTENBOER:** That's on the point of the Supreme Court granting leave. The point of the peremptory reversal is that the Supreme Court's opinion then has real precedential value rather than an order saying this is reversed and try to divine what we're talking about. We can get what the precedential value of it is from the Court of Appeals opinion. The other one, yes where the Supreme Court grants, it gives very easy access to what the Court of Appeals opinion is and tells people what it is. Yes there are people who are computer literate enough, even I can do that, to figure out how to get the Court of Appeals opinion. I'm sorry, I've been talking more on the point where the Court peremptorily reverses and published the Court of Appeals opinion so that we know what the peremptory reversal stands for, as opposed to the other point.

**JUSTICE WEAVER:** Any other questions? Thank you Mr. Schrotenboer. Noreen Slank.

**MS. SLANK:** Good morning Your Honors. The Appellate Practice Section proposed this rule and supports it, as does the State Bar Commission, which I believe this Court already knows. We had a letter that has been acknowledged by Corbin Davis, a follow-up letter sent dated August 16 where we proposed some items of fine tuning. I'm not going to address those now. I assume the Court has had an opportunity to look at that, but I can certainly answer any questions. The fine tuning, the reason we proposed those items are as a result of a study that we undertook to see how this rule, how many orders would be subject to this rule over the past two years, essentially, from April 1998 to 2000. We undertook that as a result of the MJA who is opposing this rule, is my understanding of their position. What I would like to spend my time on in terms of the 3 minutes is to address some of those items of opposition that are coming both from the Court of Appeals opposes the rule, and the Michigan Judges Association. The first thing that's coming from the letter from the Court of Appeals is that this is going to inevitably confuse the question of the precedential value of unpublished Court of Appeals opinions. I don't see how it can possibly have that effect. We know they have no precedential value. It is clear in the court rules, it is clear in the practice. I think what is being decried here is sort of a bigger picture in that it is certainly true that first with Michigan Lawyers Weekly summarizing them all, and then you can buy them over the last ten years and now with the e-journal, with the unpublished cases coming across every attorney's desk who cares to receive the e-journal every day, we're using them more and more. But they are being used as they always have been, and they only can be, for their persuasive value, not their precedential value. So I don't think that we're going to risk any confusion. The second main item I think of criticism is that the opinions weren't meant to be disseminated in this way. The in this way part is certainly true, but if this rule is enacted, the Court of Appeals will know that that is a possibility and I think we have to put it into the context of we're speaking about a very small subset of the total universe of Court of Appeals decisions. The only ones that would be affected by this rule are those presumably important cases where this Court decides to grant leave to appeal from an unpublished decision. Our study shows there were 56 of those cases in that 2-year period we studied. And the other important piece of the cases that would be affected are those where this Court essentially peremptorily grants relief to the parties. And our study showed that in that 2-year period, for example, in 10 cases this Court in an order which has precedential value of course, adopted the dissent in an unpublished decision. That is the kind of subset of cases we're talking about.

**JUSTICE YOUNG:** Without stating what the dissent was.

**MS. SLANK:** Yes. A short paragraph kind of order that reverses the Court of Appeals and adopts the dissenting opinion. That of course is not–we know your order has precedential value and there is a need to go back and figure out exactly what was happening.

**JUSTICE CORRIGAN:** Ms. Slank, can you answer the question I asked. I'm really out of the loop in terms of how we're doing with unpublished opinions from the Court of Appeals. But can you help me. Is it true that people still have to go to a page site in order to dig up the unpublished opinions of the Court of Appeals, so is this costing clients unnecessary money to make them go hunting for this.

**MS. SLANK:** The easiest way to get them is to call Michigan Lawyers Weekly and pay for it.

**JUSTICE YOUNG:** You can't get them on our website.

**MS. SLANK:** The unpublished Court of Appeals cases are not on any court website. They are on the State Bar's website for about the last year.

**JUSTICE WEAVER:** Would it solve the problem if they were on the Court of Appeals website.

**MS. SLANK:** Part of the problem would be linking the order to the–it would solve some of the problem. The Court of Appeals–

**JUSTICE YOUNG:** IF you had the case number.

**JUSTICE WEAVER:** If you have the case number and it was on the website.

**MS. SLANK:** Well, I have a lot of difficulties searching for these now.

**JUSTICE CORRIGAN:** It's costing clients money every time you're having difficulty searching for it, isn't it.

**MS. SLANK:** Yes.

**JUSTICE CORRIGAN:** So could you estimate how long it takes and I don't know what you're billing rate is.

**MS. SLANK:** Well, recently I couldn't find one. The way the e-journal, the State Bar page is supposed to work, is you're supposed to be able to put the parties' names in, either name, and you get the case. Why it doesn't always work that way I don't know. Another way it works is if you know the year and the month. That requires a phone call to

find the month and then you get an alphabetical listing. The technology side, I know that what the Court of Appeals is proposing is that as a simple fix to at least some of the problems is that the unpublished opinions, Judge Bandstra wrote, be put on the Supreme Court's web page. I heard that the plan was that they were going to be on the Court of Appeals web page, but be put on some Court page. I mean right now the State Bar is having to scan these cases in because they're not getting them in electronic format.

**JUSTICE YOUNG:** What if that was done. If the Court of Appeals opinion which is subject to this Court's grant or peremptory order were placed on our website or the Court of Appeals' website, what is then the remaining value of this proposed rule.

**MS. SLANK:** The remaining value is primarily a historical one. We're not talking, I think, about a fix only for this week and this month. But we ought to be talking about a fix for today and for tomorrow. Unless it's in the books, it isn't a fix for tomorrow.

**JUSTICE YOUNG:** I'm not even sure books are tomorrow.

**MS. SLANK:** Well I can hold it in my hand. I know where it is.

**JUSTICE KELLY:** What would you say to an amendment to this proposed rule that would indicate that as soon as a website of the Court carries this information, these opinions, that rule would sunset.

**MS. SLANK:** The rule would sunset. I think that the fix for all time would escape us. We'd know, yes we would get amicus alerted quickly. We would be able to understand more completely what is going to be before this Court, instead of just the short summary and then locating the cases that's appearing now on the web page. What we won't have is in the year 2010 when the web pages are all different, when the addresses are all different, when the links don't work anymore, we're not going to have a copy of that case. Now that's been our situation forever since there have been unpublished cases coming out of the Court of Appeals. But we thought at the section, and the State Bar is endorsing it, that this was a light bulb going on. That this was a pesky research problem that not only attorneys, but also judges, have worked with for many times. Back to the days, when you think about lawyers wanting to understand your opinions, frequently we go back to the published Court of Appeals decisions. And that is the full picture of what has happened on appeal. We go back to that to predict for clients what will happen, for example. And to understand your opinion better. We have a group of cases, the unpublished ones, that we can't do that with, and I think the only way, it is only getting it into the books that will for example, Judge Young, allow us to shepardize and pick up that order 10 years from now, and then realize we have also the opinion. Without putting it in the books, a search on Westlaw and Lexis won't work for us to find that. So I think we're hoping for a fix for–

**JUSTICE CORRIGAN:** One other question and I believe that you might have alluded to this in correspondence. There's still the problem that Judge Bandstra alludes to regarding the risk of confusion. Do you have a solution to prevent these unpublished orders or opinions from being used as precedential because they happen to be attached.

**MS. SLANK:** We are proposing with one of the fine tuning items is that with each of the orders that the concluding line of one of these orders that prints the unpublished opinion state that the unpublished opinion still has no precedential value. Boilerplate into every order. Now the rule itself specifically says that so thoughtful researchers will understand it. But I think that Judge Bandstra's point is well-taken that saying it every time we can and putting it in peoples' face with each order makes sense.

**JUSTICE YOUNG:** Well as I understand the rule, the Court of Appeals opinion or order would be published in the Michigan Reports.

**MS. SLANK:** Yes, in the fine print in the back. But Westlaw and Lexis pick those up in terms of their text searches so printing it there will let us still find it. For example, if I want to find every case that mentions Smith v Jones and the unpublished Court of Appeals case mentioned that, my search is going to then find that.

**JUSTICE YOUNG:** All I'm suggesting is that if you find the Court of Appeals case printed in the Michigan Reports, that's a pretty good indication that it's non-precedential. In the back section of the reports.

**JUSTICE MARKMAN:** So it would not be appended to the Supreme Court opinion. It would be segregated with Court of Appeals opinions and orders in the back of the volume.

**MS. SLANK:** It would be in the back pages in the 900s and 1000s and so forth. Thank you for the opportunity to speak.

**JUSTICE WEAVER:**Thank you. Jack Elliott.

**MR. ELLIOTT:** Hi. My name is Jack Elliott. I live in Ionia County and I think we need to publish more of the cases that may be in one case it really doesn't set a precedent but when you get something new that comes down the road it sets a precedent for that case and Hesicia Bibb (sp) v City of Flint was a very good case on junk cars and it might have prevented me from going through a very big battle with the County of Ionia. And had they had better access to cases like that because in Ionia we don't have zoning yet.

I had old cars in the yard without plates. Well that case clearly states that just because you've got an old car, it doesn't threaten your health, it doesn't threaten your safety and there is nothing immoral about it. So it really doesn't meet the public need that they put to it. And I'm out in the country, I had 55 acres at the time so it wasn't like I was dumping stuff on somebody else's property line or even near it. And I had an Ionia County Deputy break and entry my house without knocking, announcing, without warrants, assaulted me with pepper gas because I had these old cars in the yard without plates and he was going to arrest me for it. Because they had worked very hard making warrants out over their ordinance. And had they had this case they would have maybe known better that they can't have an ordinance like that. And even so it might have helped me fight the thing off instead of doing 22 days in jail and then after I tried to seek justice myself by going through the court system it was all covered up and went to federal court and Judge Hillman that the deputy reached down, opened the unlocked door and leaned in to announce himself. So he wrote the Fourth Amendment violation in his opinion, then he dismissed my case. And the motion for summary disposition that came was based on a time that he forgave him once, they came back again on a second deadline, which was March 5, he asked them to have it by that deadline. They got it in March 6 and it was sent to the wrong name and wrong address. And so when I don't have unpublished cases, and I've been trying to find a lot of them too, because they do a lot of times meet our standards, because that case went through three courts and did not miss one time being ruled that it didn't hamper the public's health, safety and morals. And I really think that we need to make some changes here because I'm finding that our judges, as far as talking about rules, don't follow the rules when it suits their needs and I've got much proof of that.

**JUSTICE WEAVER:** Any questions? Thank you Mr. Elliott. Mr. Jerry Bush.

**MR. BUSH:** Mr. Elliott, my name is Jerry Bush and I'm a pro se litigant and have been involved in a number of cases over a 10-year period of time or more and had probably 7-10 Court of Appeals cases that have gone to the Court of Appeals and never had a published decision yet. The issues that Mr. Elliott just spoke about have affected me too greatly. Just last year I had 18 cars taken off four pieces of property in the City of Zeeland in spite of making them clearly informed of the case that he was talking about that's City of Flint v Bibbs, which I offered to them as a precedent in the circuit court. They ignored it. But the Court of Appeals in that case said, and I'm just going to read a brief quote. I'd like a little more than 3 minutes too by the way.

**JUSTICE WEAVER:** We have to limit you to 3 minutes.

**MR. BUSH:** However, plaintiff's ordinance beared no real or substantial relationship to public health, morals, safety or general welfare insofar as it concerns

automobiles and that they are merely inoperable or lacking current plates. Such automobiles pose no threat to public health or safety. And he says later that's it overbroad. This was a Court of Appeals opinion there. Just in addressing this, we're not exactly on what your rule is, and I know that you're probably ignoring me but that's fine, go ahead and do it if you want to. In Lawyers Weekly, August 28, 2000, on the front page it talks about two unpublished cases in the Court of Appeals. I've got them pinked out here you can see them. One is a small one down here. Attorney testify, no attorney-client privilege. Okay that probably doesn't affect me too much. But the just and fair treatment clause helps defeat immunity claim. And the guy is awarded $7.6 million. And this went to the Court of Appeals but it's unpublished. Unbelievable. Injustice. All right, the Court of Appeals in another case of mine said that–this one, I sought to disbar one of your bar members who was derelict in his duties and has no ethics whatsoever, and I asked the Tenure Commission to do that. They said no, we are not going to do that because we're without jurisdiction, even though I've had five teacher tenure cases, they were without jurisdiction and this guy was unethical in every one of them. And of course he represented the school district. In another case having to do with attorney malpractice, and my first teacher tenure case, the Court of Appeals says in an unpublished ruling "the complaint also alleges"–this was a malpractice case if I didn't say, "the complaint also alleges a conflict of interest, abandonment, neglect, failure to represent the best interests of the client and other violations of the ethical standards of care and trust." And then they went on to say that without an expert witness Mr. Bush could not pursue the case. In other words, screw you. We don't care what you got, and this is what we're trying to tell you as pro se litigants that a lot of good cases and a lot of bad cases and even the prosecutor admitted that, are being buried because they are unpublished. I can show you cases that were supposed to be appeals by right where they dismissed them without even making an opinion, of my own. And I can show you other cases that were just about as bad. Now we're here accusing the Court of Appeals of wrongdoing. Some of you have been there, so we don't expect too much. But we do want you to be aware, and we're making a record that this stuff is going on. Okay. Got any questions?

**JUSTICE WEAVER:** Thank you Mr. Bush. Appreciate your information.

Item 4: 99-22: Proposed Amendment of Rule 2.302 of the Michigan Court Rules

**JUSTICE WEAVER:** We're now going to move to Item 4, which is 99-22. This is a proposed amendment of Rule 2.302 of the Michigan Court Rules of whether to eliminate the provision that allows for discovery regarding expert witnesses by "other means" than interrogatories and depositions. Now Mr. William Luther has asked to speak on this matter.

**MR. LUTHER:** Yes, Your Honor, I'd like to pass on that.

**JUSTICE WEAVER:** Want to pass on that one.

Item 5 - 99-25: Proposed New Court Rule 3.106 and Proposed Amendment of Rule 4.201 of the Michigan Court Rules

**JUSTICE WEAVER:** The next item then, we'll move on to 99-25. This item involves proposed new court rule 3.106 and proposed amendment of Rule 4.201 of the Michigan Court Rules. Whether to adopt rules regulating the practices of court officers with regards to writs of execution and orders of eviction. Asking to speak on this is first Mr. Troy A. Scott.

**MR. SCOTT:** Thank you again Your Honors. Again, Troy Scott speaking on behalf of the Michigan Creditors Bar Association. We would like to let this Court know that we in general approve of this amendment. We believe it is probably overdue, but there are some significant changes here, or if not technical issues that have to be addressed before we believe this rule should be adopted. I will address the provisions 3.106(B) I think needs to address the role of sheriffs and deputy sheriffs in the execution of property. Historically they've carried out writs of execution and eviction and they continue to act throughout the state of Michigan I think even more so in less populated counties. Certainly the consideration in this particular statute needs to address our sheriffs and deputy sheriffs. That's section B and although it is entitled court officers, we have to be mindful that this court rule states persons who may seize property are those named in 2.103(B) and are referred to as court officers. And in fact deputy sheriffs need to be included somehow. So this particular provision needs to be reworked. In addition, Section (C)(5), a court may limit service of writs of execution and orders of eviction to court officers appointed by the court. Again we either need to add perhaps a phrase "excluding deputy sheriffs" or somehow incorporate them again in this section. The same I would argue applies for most of the provisions starting with subsection (E) procedures regarding the issuance and service of writs of execution, which address the way in which these executions shall be endorsed by the court officer and they go on to speak about the court officer shall carry and display identification issued by the court under (F). I think again we have deputy sheriffs doing the same thing and there really is no mention of them. And I think it's left unclear and is ambiguous and we should clarify this to acknowledge and address that deputy sheriffs are in fact doing these same activities pursuant to court order. Beyond the deputy sheriff situation, 3.106(C)(4)(b)-obtain court approval of the employees and contractors who assist the court officer in the seizure of property or evictions. I think it's a little unclear. I understand employees of a court officer and the need to have those employees approved by the court. However the word "contractors" I think is intended to mean anyone who works again for

the court officer, and perhaps it should say independent contractors who work for the court officer. Because otherwise contractors may be taken to mean towing services or other commercial businesses who are employed by the court officer for purposes of carrying out the execution. And I think when it comes to district court judges, probably the last thing they need to be doing is approving towing services. The court officers could do that. I'm sorry, is there a question.

**JUSTICE CORRIGAN:** Have you communicated these ideas to the Court in writing.

**MR. SCOTT:** Actually the notion that this needs to be rewritten to address the deputy sheriff involvement I think was already done at the State Bar level, excuse me, it was supplied to the Supreme Court in response to the publication in the State Bar Journal by I think Levitt, I believe. Maybe Zenn.

**JUSTICE CORRIGAN:** Well make sure your thoughts are in writing somehow Mr. Scott, or the Section's thoughts.

**JUSTICE WEAVER:** If you would send them to the clerk of our Court.

**MR. SCOTT:** I would be happy to provide that.

**JUSTICE CORRIGAN:** One other question. Do you have any reason to believe that the Committee that looked at this intentionally omitted deputy sheriffs.

**MR. SCOTT:** Not at all. I see this as clearly unintended. Finally, Your Honors, 3.106(G), disposition of property and money, (2) money received by a court officer that is owed, getting right down to it, shall be paid to the plaintiff. We would simply ask that that include "or the plaintiff's attorney". In some cases plaintiff's attorney is under agreement to fund costs or advance costs and upon settlement those costs are obviously reimbursed to the attorney. But it's common practice as I'm sure you all know, for attorneys to have the option of receiving those settlement checks and I think this just is an oversight, not including plaintiff's attorney in that section.

**JUSTICE WEAVER:** Any further questions? Thank you very much. Mr. Otis Davis.

**MR. DAVIS:** Good morning. First of all thank you for this opportunity to appear before you this morning on this very important issue for the 36th District Court. I'm Otis Davis, the court administrator for the 36th District Court which is the largest district court in the state of Michigan, as you know, and one of the busiest in the country. We have

over 500 employees with the court, 484 court employees, 31 judges, 6 magistrates, 10 court officers and 7 bailiffs. The 10 court officers were hired as independent contractors in July of 1998 until a recent MERC decision in January of 2000 that directed the court to employee these court officers as full time employees. Prior to that time they were contract employees. We have just begun the negotiation process with the union to make these court officers and bailiffs court employees. The 36th District Court supports these proposed court rules because they do attempt to develop some uniform standards in terms of the hiring and qualifications and procedures for court officers. At the current time almost anyone can be appointed a court officer within the system. There are no uniform standards regarding the appointment process. The proposed rules also establish some clear processes and procedures regarding the seizure of property and eviction as well. In my short tenure as a court administrator of the 36th District Court of approximately 22 months, I have received numerous complaints regarding activities on the part of the court officers and bailiffs, especially regarding their charging the fees for eviction. I currently have four investigations on my desk now regarding the behavior of the court officers and bailiffs. There are many more within our system within the court that do not reach my desk but are handled at lower levels within the court. We also have concerns regarding the staff that are subcontracted by the court officers. The proposed court rules will allow the court more oversight in terms of the subcontracting of staff that the court officers hire. In the past there has been little or no control as far as the court in terms of the actions of the bailiffs or the court officers. The MERC decision which I mentioned earlier that directed us to hire these court officers as court employees had a significant financial impact on the court. We had to allow for 10 positions to assume these court officers. These are 10 positions that we could have used for other staff functions within the court but because of the MERC decision we had to assume these court officers as regular court employees, so it has some significant cost implications for the court. We hope these proposed court rules are adopted as soon as possible but I'm not sure it will have any impact on the MERC decision that occurred in January of 2000. They have the potential of having a real positive impact on the operation of the court and our relationship with the community. Also testifying today will be Ms. Connie Allen who is the judicial assistant for the 36th District Court, and she has some specific issues regarding adoption of these rules. And I'll be glad to respond to any questions that you may have at this time regarding these proposed rules.

**JUSTICE WEAVER:** Any questions, Justices. And Ms. Constance Allen is the very next person up.

**MS. ALLEN:** Good morning. Constance Allen. I'm the judicial assistant for the 36th District Court. I'm going to keep my comments brief. I have a lot of respect for the drafters who attempted to do this and I agree with Mr. Davis that they are needed. I've been at the 36th District Court a little longer, about 8 years, and the bailiffs have provided me with a plethora of legal work to do on behalf of the court. They are, and many people do not

know this, statutorily grandfathered in as the only bailiffs remaining in the state. There is a problem because they are very particular on their interpretation of laws with regard to what they consider their property in executions and writs of restitution and service of process. In fact they went to federal district court when the court rules changed to allow for anyone over the age of 18 who is competent and not a party to serve process to try to preserve that interest and the federal district court did not find that that statute which said they have the exclusive right to rotation of all civil process gave them that right. However they have continued to assert that nevertheless. So I get to my first point in terms of the language of 3.106(B) which although it incorporates bailiffs by incorporating the language of MCR 2.103(B) (sic) does not specifically say that bailiffs are controlled by this court rule and in fact there are some parts of this court rule that would be in conflict of the statute that appoints them essentially for life subject to dismissal only for malfeasance or misfeasance in office. So therefore the subsequent section of the court rule that says you appoint court officers for a term no longer than two years is in conflict with that and I would reiterate what the gentleman who represented the creditors bar association said and that is that by incorporating 2.106(3)(b) which does refer to sheriffs, deputy sheriffs, police officers when a city is involved as a party, the state police when the state is involved as a party, would be problematic in terms of who gets appointed for 2 years by the court to be a court officer because the court officers include that definition in subsection (b). There is no provision for removal of court officers during that term and I would suggest that that be added. There are other language provisions in here but I would like to reserve that in light of the time that I have left and I would submit that in writing to you and I would ask for the opportunity to do that. As to the other amendment again we have some problems with that in light of the volume in the 36th District Court, especially with regard to the requirement that the writ be delivered to the court officer within seven days of filing. Our court clerks deliver those writs to our judges for signature. Whether a judge signs that within the next week or the next two weeks is not within the control of our court clerks at the windows, or any other court clerk, probably not even the judge's court clerk. So to require that I would just suggest that it be changed to seven days after it has been signed and that would get that to the court officer within that time whether or not the judge signs it or not. Again I would ask that I just be given the opportunity because we have some issues with regard to the language of reasonable fees, with regard to writs which is a big issue in the 36th District Court, and as to subcontracting, independent contracting, making somebody an independent contractor by court rule I think is very problematic in light of the long case law as to who is an independent contractor and who becomes an employee, which we were enlightened by the MERC decision.

**JUSTICE WEAVER:** Would you see that all of your written comments get to our clerk, Mr. Davis and then they will be distributed to all the judges. Any questions, Justices. Thank you. Now we have Mr. Jeff Kirkpatrick.

**MR. KIRKPATRICK:** Good morning. I am a member of the Ad Hoc Committee who recommended this court rule. I am court officer and the current president of the Court Officer Deputy Sheriffs Association of Michigan and the Association supports the overall intent of this rule. But today I appear before you as a court officer speaking as one who this rule will ultimately affect. And the real issue that we tried to bring about was to create an enhanced level of professionalism within the industry. To create a uniform appointment process of court officers. As Troy Scott, the earlier speaker, said, the issue relative to deputy sheriffs, it was not the intent of the committee to include deputy sheriffs to where the judges have the oversight of what the sheriff decides to do with his or her deputies. The lifetime appointment court officers we tried to address that in section (C) to except the court officers that are appointed specifically relative to the 36th District Court. That we know they are there for life appointments and we're not trying to fit them into the 2-year window. One of the sections, section (C)(5) is again we don't want to include deputy sheriffs and who the judge has the ability to authorize to do executions because they are already set by statute that they have the authority to do that. Also from the language or the way this was created, a lot of notice references to the plaintiff. It should also include language plaintiff's attorney because generally when we work these executions we're dealing with the plaintiff's attorney and not the plaintiff directly. And we will follow up in writing the comments that I've made and I'm going to get with Troy Scott of the Michigan Creditors Bar Association and try to formalize some of this in writing. Thank you.

**JUSTICE WEAVER:** Any questions? Thank you very much. Mr. Jerry Bush.

**MR. BUSH:** Hello again. I would like to say that although I don't know a lot about what's going on in this proposal, it seems to me that the drafting of this is legislative act, not a judicial act. The executive branch is supposed to be the law enforcement branch of the government, not the judicial branch. And what we've got here is some people that are setting themselves up as law enforcers but outside the executive branch. And I think that this whole thing is unconstitutional and they cannot claim to be court officials, I don't think that they should be claimed to be court officials and if they are, that that should be summarily set aside because they are not in a position to do that kind of work. Not only that, but there is an immunity issue. A lot of times court officials are immune from their misconduct because of their position but executive branch individuals are not. If they are seizing property and they do it wrongly or they do it unjustly, I think the citizens of this state need the right to sue their butt off and get a decent recovery out of it. And I hope that you would see that too.

Item 6 - 99-36: Proposed Amendment of Rule 7.319 of the Michigan Court Rules

**JUSTICE WEAVER:** Item no. 6. A proposed amendment of Rule 7.319 of

the Michigan Court Rules, whether to exempt prosecutors from the $150.00 fee in the Supreme Court for motions for immediate consideration and to expedite appeal. Mr. Jerrold Schrotenboer.

**MR. SCHROTENBOER:** Yes, Jerry Schrotenboer from the Jackson Prosecutor's office. I'm not going to shock you here. I'll take the stereotypically prosecutor position and yes for what it is worth, I am asking you to adopt this. Though other prosecutors of course could be far more articulate on this. I do understand some of the concerns, some of the reasons why people have opposed this. Basically saying that this makes an uneven playing field, that this gives the prosecutors a special advantage. In reality it actually does the opposite. Most criminal defendants before this Court are indigent. They do not have to pay. Which means then the prosecutor has to pay. This would even out, would level out the playing field. And in reality, there are extremely few times when a prosecutor would file a motion for immediately consideration before this Court. And about the only time I can think of, about the only time I've done it, is when we're getting close to trial and the double jeopardy clause happens to impinge on only one litigant, prosecutors. Basically I see it as a good idea and for what it's worth I'm asking that you in fact adopt it. After all, it is consistent with what the Legislature has said and it seems to me that what the Legislature has said is a fairly good idea.

**JUSTICE KELLY:** Well then you would agree with an amendment that would make this rule effective only where there was an indigent defendant involved.

**MR. SCHROTENBOER:** That's not a bad point. I wouldn't complain about that.

**JUSTICE CORRIGAN:** I would just chime in, as chief judge of the Court of Appeals I appeared on the committees that dealt with this amendment and actually we did not seek this, it was suggested by Senator Van Regenmortor because of the very problem you just pointed out, that something in the neighborhood of 95%, and this was based on a legislative study, 95% of the emergencies in the Court of Appeals are for indigents, so the prosecutors were being asked to pay where the defendant would be represented by appointed counsel. That was one thing. Then there was a study done that showed that there were only 39 of these filed in the year, although there were in excess of 1,000 emergencies that year, so that was why it looks like this. When you look at it intuitively it looks unfair but when you actually study the data which is what the Legislature did, you understand the reason for the amendment.

**MR. SCHROTENBOER:** That's right. There is of course the additional concern about it really is kind of strange having one governmental agency pay another governmental agency, that kind of thing, for what that's worth. But if we take it out and it's

waived only where the defense is indigent, actually that is about 95% of the cases and considering how many times I file motions for immediate consideration with this Court, I may have to pay like about once every 5 or 10 years then. So I wouldn't complain too much about that.

**JUSTICE YOUNG:** Is that with the amendment proposed by Justice Kelly be consistent with the statute.

**MR. SCHROTENBOER:** I think the statute says only Court of Appeals. And let's also not forget that the prosecutor can, prosecutors are occasionally involved in civil cases and is very seldom any–the indigency in civil cases is very often irrelevant, like forfeitures. Although I've never taken a forfeiture up this far. Actually I think the amendment would be consistent with the Legislature.

**JUSTICE CAVANAGH:** We received correspondence from Tim Baughman indicating that the practice in the Court of Appeals currently is to waive the fee for the prosecutor where there is appointed counsel.

**MR. SCHROTENBOER:** Yes and no. That is true in every last single case where it's a defense appeal. That is never true where it is a prosecutor appeal.

**JUSTICE CAVANAGH:** In the Court of Appeals they don't follow the statute? The statute as I understand it makes no distinction between–

**MR. SCHROTENBOER:** The Court of Appeals follows the statute as far as I know on motions for immediate consideration. I thought you were talking a more general principle of prosecutors having to pay filing fees. Unlike this Court which requires a prosecutor to pay a filing fee for absolutely everything, the Court of Appeals waives filing fees on all cases where it is a defense appeal and the defense is indigent. The prosecutor does not have to pay at that time. But if it is a prosecutor appeal the prosecutor has to pay for all filing fees.

**JUSTICE CAVANAGH:** Regardless of the status of the defendant.

**MR. SCHROTENBOER:** That is absolutely correct. Now I see that as a little bit unfair but oddly enough the Court of Appeals doesn't listen to everything that I say. But of course everything that I say here today is for what it's worth.

**JUSTICE KELLY:** Well at least in those cases the prosecutor isn't forced into the case the way the prosecutor is when the defendant appeals and is indigent, correct

**MR. SCHROTENBOER:** Well I guess that depends on what you mean by forced into the case.

**JUSTICE KELLY:** He is not obliged to be a litigant.

**MR. SCHROTENBOER:** Actually I think is obliged to be a litigant. Defendant kills his wife, chops her up and all that other stuff. Do we really have any choice but to become a litigant. I know where you're coming from but in reality we don't have a choice. We are required to criminally enforce the law. We have slightly more choice than defendants do, but not much.

**JUSTICE KELLY:** We're talking about a case here where a jury or judge has found there is no guilt. That's where the prosecutor appeals, correct.

**MR. SCHROTENBOER:** If the jury or judge has already found no guilt, that's the end of it. The statute and this Court's rules refuse to allows us to appeal, period. I'm not quite sure what you're getting at.

**JUSTICE KELLY:** Under what circumstances does a prosecutor appeal.

**MR. SCHROTENBOER:** Prosecutor appeals when there is a ruling short of double jeopardy, of course, that the prosecutor feels sufficiently damages the case. That the prosecutor must get changed. Now motion for immediate consideration will be filed in this Court pretty much only if it's a interlocutory appeal. In other words we're getting pretty close to trial and we couldn't get a stay for whatever reason.

**JUSTICE KELLY:** So that's the situation where the prosecutor has been found by a lower court not to have merit in his position, correct.

**MR. SCHROTENBOER:** Thank is true.

**JUSTICE KELLY:** So he is not obliged to appeal, he chooses to appeal because he believes that is an incorrect ruling.

**MR. SCHROTENBOER:** That is true.

**JUSTICE KELLY:** So why shouldn't he pay when he exercises that.

**MR. SCHROTENBOER:** And a criminal defendant who happens to be sentenced to five consecutive life terms is not obliged to appeal either, but strangely

enough, he usually often does.

**JUSTICE KELLY:** Well the prosecutor is not going to be in prison and the criminal defendant is.

**MR. SCHROTENBOER:** That's true but I'm not so sure, you see justice does kind of cut both ways. If in fact the evidence should not have been thrown out and we have this, for example, axe murderer out on the streets, I don't know that that is not as bad a situation as this axe murderer has just been put in prison for five consecutive life terms. I'm not entirely sure about that. The point here is this rule does even out the playing field on this.

**JUSTICE CORRIGAN:** Just to make it clear, we are not talking about the general situation of all appeals, we're talking about the narrow situation in the emergency setting for a motion to expedite or for immediate consideration, which is a small subset of cases.

**MR. SCHROTENBOER:** Absolutely, and for the small subset of cases. And I think I filed only two or three before this Court in my entire career. It evens out the playing field.

**JUSTICE CORRIGAN:** But all this rule does is make the practice consistent with the current Court of Appeals practice which is statutory, because our fee setting is by the court versus the statutory fee setting by the Court of Appeals. That's all this is involving, correct.

**MR. SCHROTENBOER:** That is exactly what it does, and I king of think it should be adopted.

**JUSTICE WEAVER:** Any further questions, Justices? Thank you. Mr. Jerry Bush.

**MR. BUSH:** Jerry Bush. Personally I don't think it should be adopted. I have not too much sympathy for prosecutors in the first place because I have been mistreated by them and some of the other people in this courtroom have been as well. But on the other hand if their issue is so important that a murderer is going to walk the street for $150, there isn't a one of us here that would say that they shouldn't spend it. So if they have $150 and they figure their issue is so important, then let them spend it to go to the Supreme Court. A lot of us have spent hundreds of dollars coming to the Supreme Court and got turned away with denied leave, denied leave. I mean I've been here 5, 6, 7 times, I don't know how many times even. And we spend our money, $250, and told to get out of here. So let the

prosecutor pay his $150.

**JUSTICE WEAVER:** Thank you Mr. Bush. Anica Letica.

**MS. LETICA:** Good morning Chief Justice, fellow Justices. Thank you for giving me this opportunity. I think Mr. Schrotenboer has pretty much summed it up and I asked for this court rule change. The reason I did it was because I had an interlocutory appeal and when I got the bill I realized why would it be that I would have to pay the filing fee here and not pay it in the Court of Appeals. The situations where I take these kinds of appeals are situations maybe not as dramatic as those cited by Mr. Schrotenboer but in situations for example where defendant's confession is suppressed before trial and I believe that the decision is clearly erroneous. In an interlocutory appeal, it is a small subset of cases and even for non-indigent defendants the problem is that the People are the only ones that are confronted with double jeopardy considerations. And if a confession or a major evidence is suppressed, we need to come here.

**JUSTICE KELLY:** Maybe we should just require indigent prosecutors not to have to pay.

**MS. LETICA:** I understand maybe for Oakland County it may not be as much of a resource problem as for some other counties, but I don't think that the People should be burdened by that consideration when the defendants aren't.

**JUSTICE CAVANAGH:** So you would limit it to those situations where defendant is indigent.

**MS. LETICA:** I still think that the People have the problem that they are the only ones that face double jeopardy concerns and maybe limited resource concerns, whereas the defendant who is able to hire his attorney, he probably has the resources to do it. The People shouldn't be faced with that when they're faced with a double jeopardy concern.

**JUSTICE CORRIGAN:** It's not the prosecutor's money, it's the taxpayers' money.

**MS. LETICA:** It is the taxpayers' money, correct.

**JUSTICE MARKMAN:** The Court of Appeals rule does not limit it to cases in which there are indigent defendants, does it.

**MS. LETICA:** It does not and the specific limitation in the statute, and I agree with the Court that it should go here as well, is in criminal cases only. I'm not asking

for an exception in a civil case. I don't think that should apply. There we might be dealing with money, we might be dealing with forfeiture. If we decide to come here to the Court on an emergency basis on a civil case, well then we should pay like everybody else. But in a criminal case when we are faced with double jeopardy considerations, we shouldn't have to pay. Thank you.

Item 7 - 99-40: Proposed Amendment of Rule 9.118 of the Michigan Court Rules

**JUSTICE WEAVER:** Item no. 7, 99-40, proposed amendment to Rule 9.118, whether the Attorney Discipline Board should be precluded from accepting a delayed petition for review that is filed more than 12 months after the hearing panel issues it's order, no one requested to speak on that, and we'll move on to item 8.

Item 8 - 99-45: Amendments of subchapters 3.700 and 5.900 of the Michigan Court Rules

**JUSTICE WEAVER:** Item 8, 99-45, proposed amendments of subchapters 3.700 and 5.900 of the Michigan Court Rules, whether to retain recently adopted court rules regarding the procedures applicable to minor personal protection orders, Mr. Jerry Bush has asked to speak. Mr. Bush.

**MR. BUSH:** Jerry Bush. I will speak very quickly. This seems to me to be legislative and it should not be even entertained by the Court as far as I'm concerned.

Item 9 - 99-47: Proposed Amendment of Rule 2.116 of the Michigan Court Rules

**JUSTICE WEAVER:** No. 9. Mr. Bush you might want to stay up because no. 9 is administrative order 99-47, a proposed rule for 2.116, whether to provide that a court is to decide a motion for summary disposition on the basis of substantively admissible evidence admitted by the parties, you had asked to speak on that also.

**MR. BUSH:** Yes. A motion for summary judgment is pretty serious business because it takes away a pro se litigant's or even an attorney-represented litigant's right to a jury trial. And when you're dealing with affidavits you're dealing with people who can sign them and lie and pervert the truth. And if you accept summary judgment based upon an affidavit, a judge rules based upon an affidavit, he's basically saying that I'm taking the place of the jury and I'm going to judge this case by the credibility that I award to this person's affidavit versus that person's affidavit. And what we've done then is denied the jury their job which the courts have numerous times said is to decide credibility issues. I don't think that affidavits ought to be submitted in any summary judgment instance. Not any. In fact Mr. Luther sitting back there has a case that has just come before the Supreme Court, we don't even know what the number is yet, where two affidavits were submitted by

the defendant. He had loaned the money, tried to get the money back through a court suit. Affidavits were submitted, summary judgment was awarded to the defendant on two conflicting affidavits. Mr. Luther didn't even file one. But his claim is that these two conflicting affidavits shouldn't be deciding summary judgment. The whole issue is credibility and somebody is lying about whether there was a partnership or not. One affidavit says there is a checking account with both names on it. And the defendant says I don't have a partnership with that guy. So I know that you're looking at this probably a little more narrowly than I addressed it, but we don't think that summary judgment is just in the first place, and then to have it based upon affidavits where a person can freely lie, and the other person if he tells the truth it's still not decided justly. In that case there was no due process even to allow Mr. Luther to know what the summary judgment process was. He never even seen the judge until it was issued. Afterwards then he moved to set aside and brought up the issue that it was conflicting affidavits and the judge said so what. You know, I mean, hey, that's the way to dispose of peoples' cases. I don't think so. It seems to me that summary judgment itself might be unconstitutional. Any questions?

**JUSTICE WEAVER:** Any questions? Mr. Bush, why don't you just wait because you're up on the next one.

**MR. BUSH:** I'm not getting any time to prepare here.

**JUSTICE WEAVER:** Well, I can let Mr. Luther come first on this, would you like that. And you want to prepare for the next two. I'll call Mr. Luther right now, how's that?

Item 10 - 99-52: Proposed New Rule 2.626 of the Michigan Court Rules

**JUSTICE WEAVER:** Okay, item 10, which is proposed new rule 2.626 of the Michigan Rules, whether to provide that an award of attorneys fees may include an award for the time and labor of legal assistants who contributed non-clerical support. Mr. Luther.

**MR. LUTHER:** Wayne Luther. I agree to that. Oh, I just want to say, I think we all have different motives for coming here, of course, and we all affect this world whether we try to or not, and so our actions and thoughts and opinions and court orders matter and our consciousness is the supreme act of being loving, caring and thoughtful is the most superior creative act. Thank you. God bless all of you.

**JUSTICE WEAVER:** The reason, Mr. Luther, we have these hearings is because we believe it's important to hear what people are thinking about. And everyone. Okay, thank you. Mr. Bush, he didn't give you much time to prepare but.

**MR. BUSH:** That's all right. I think this issue is a short one. Jerry Bush again. Whether to provide at an award of attorney fees may include an award of time and labor of legal assistant who contribute to non-clerical support. In a way I think that would be valid. On the other hand, any time attorney fees are issued, some close examination ought to be made of the case first of all, in the first place, but it's possible, I've had a case where attorney fees were awarded against me when I should have won the case. Cost me a great deal of money, $11,000, $13,000, and that was in federal court. And it's really harmful, but there are a lot of attorneys out there who are unjust and doing wrong things, and attorney fees ought to be awarded against them, making them pay. But another thing that concerns me about this is a lot of times when pro se litigants win a case they don't get anything. They do all the work, all the appeals and they get nothing. And if you would like to check on that you need to check on some of the Open Meetings Act cases and the Freedom of Information Act cases where pro se litigants are not awarded anything for attorneys fees, but if you have an attorney then you are. And I think that's unfair and unjust and I want you to know that. Thank you.

**JUSTICE CAVANAGH:** Do you recover other costs in those situations.

**MR. BUSH:** I've not been there myself and I don't know about that, I couldn't answer. I mean I've read the cases but I don't know. I don't remember if they were awarded cases.

Item 11 - 99-54: Proposed Amendment of Rule 2.118 of the Michigan Court Rules

**JUSTICE WEAVER:** Item no. 11 is administrative 99-54, proposed amendment of Rule 2.118 and whether to specify that the relation-back doctrine does not apply to the addition of a new party.

**MR. BUSH:** May I question you as to what the relation-back doctrine is first.

**JUSTICE WEAVER:** Yes I think Justice Corrigan is interested in that rule particularly and Justice Corrigan would you like to explain to him the relation-back–

**JUSTICE CORRIGAN:** I don't answer questions. You're here to make the presentation and if you're not prepared Mr. Bush, you shouldn't be speaking to the Court.

**MR. BUSH:** Well, all right I'll tell you that from what I gather it might be is to add another defendant or something into the party and if that is the case that you can't add a new party late into the case, let's say after the Court of Appeals decision or after the

Supreme Court decision, if that's the intent, my answer to that is no. And I would say that I would go to the federal court and find that the Supreme Court has even allowed defendants to be added after cases have been there so we don't want to do that here. Thank you.

Item 12 - 99-62: Proposed Amendment of Rule 2.118 of the Michigan Court Rules

Item 13 - 00-13: Amendment of Rules 2.113, 5.113 and 8.117 of the Michigan Court Rules

**JUSTICE WEAVER:** Thank you Mr. Bush. The last items, no. 12, administrative 99-62, a proposed amendment of Chapter 5 and Rules 2.420 and 8.303 of whether to amend and finalize interim court rules relating to the new Estates and Protected Individuals Code and Item 13, 00-13, an amendment to rules 2.113, 5.113 and 8.117, whether to retain these recent amendments concerning case code classifications, no one has asked to speak on these items. Is there anyone here who is appearing who did not request to speak who has something they would like to bring forward.

**MR. ELLIOTT:** Can I bring up one thing?

**JUSTICE WEAVER:** Well, on a specific item here?

**MR. ELLIOTT:** (inaudible).

**JUSTICE WEAVER:** Come forward please. You'll have 3 minutes.

**MR. ELLIOTT:** Again, my name is Jack Elliott and what I'm addressing is we are talking about changing rules but I find that the rules are never followed when the judges don't want to follow them. And what's the point in changing rules if we don't follow them. A perfect example is a venue question that I had and they moved the venue to Clinton County from Ionia County with no motions, nothing on the record. I mean there was just absolutely nothing. The judge didn't want to travel so they moved it. And the problem I have is we've sat here and discussed rules and I've listened to it and there are a not of changes that probably need to be done. But if there is nobody to enforce them, then we're all wasting our time. And I really feel that that's a serious problem. And the only way that we can do anything about it is by trying to go through the Court of Appeals which is an awful expense, an awful hassle, just to make a judge follow the court rule which is ministerial. I mean it's not even a question that we can sit there and argue about. It's very simple on the venue. It's probably one of the clearest rules in the whole book and yet because the judge didn't want to travel he took the case over into Clinton County and dismissed it. And I feel that discussing rules right here, right now, when are we going to have a chance to see these rules actually enforced the way they're written.

**JUSTICE WEAVER:** Okay, thank you Mr. Elliott. Okay, that concludes all the items we have on this agenda today. We thank all of you for taking your time to come and share your thoughts with us and with that we will be adjourned.